

Affirmed; Majority and Dissenting Opinions filed August 31, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00174-CV

OMAR MONTES, Appellant

V.

CITY OF HOUSTON, Appellee

**On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 98-05537**

MAJORITY OPINION

This is an appeal from an order granting the City of Houston's plea to the jurisdiction. The sole issue raised on appeal is whether sovereign immunity protects the City from liability.

FACTUAL BACKGROUND

The underlying litigation arises from a single automobile accident occurring shortly before midnight on July 13, 1996, at 600 West 6th Street, in Houston, Texas. Four young men, including the appellant, Omar Montes, became lost while returning from a wedding. As they

were driving, the street suddenly ended. Their car left the road and traveled thirty-one feet from the end of the road before striking a large pile of dirt. Of the four men in the vehicle, only Montes survived the crash. According to the police report, speeding and alcohol contributed to the accident.

Over a month before the Montes accident, Wenny Susanto was driving her car on the same street (West 6th Street) at approximately 9:30 p.m. Like the car in which Montes and his companions were traveling, Susanto's car also crashed into the pile of dirt at the end of the road. Susanto reported her accident to Officer Steve Liddle of the Houston Police Department on June 2, 1996, the day after it occurred. In addition to driver inattention, Officer Liddle cited a lack of barricades as a possible contributing factor in the Susanto accident.

PROCEDURAL BACKGROUND

Montes originally filed suit under the Texas Torts Claims Act on February 4, 1998, and subsequently filed an amended petition on January 8, 1999. Montes claims the failure of the City to place a barricade or warning lights at the dead end of West 6th Street exposes the City to liability. According to Montes, the notice provided by Susanto gave rise to a duty to correct the hazardous condition within a reasonable time. While Montes acknowledges the existence of a warning sign on the road just before the dead end, he claims the sign was poorly lit. Moreover, Montes claims that due to the lack of barricades, the lights create an optical illusion that the road continues beyond the dead end.

The City filed a plea to the jurisdiction on November 4, 1998, claiming the trial court lacked subject matter jurisdiction because Montes could not show a waiver of sovereign immunity. According to the City, the decision to place a barricade or other warning device is discretionary as a matter of law, thereby providing the City with immunity. The trial court granted the City's plea to the jurisdiction.

STANDARD OF REVIEW

Whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo*. See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999). A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of the action. See *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). The plaintiff bears the burden of alleging facts affirmatively demonstrating the lack of governmental immunity and therefore, the trial court has subject matter jurisdiction. See *Reyes v. City of Houston*, 4 S.W.3d 459, 461 (Tex. App.—Houston [1st Dist.] 1999, pet. filed). When deciding whether to grant a plea to the jurisdiction, the trial court must look solely to the allegations in the plaintiff's petition. See *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied). The court of appeals must take those allegations as true and construe them in favor of the plaintiff unless the defendant pleads and proves the allegations in the petition were fraudulently made. See *Michael v. Travis County Housing Authority*, 995 S.W.2d 909, 911 (Tex. App.—Austin 1999, no pet.).

SOVEREIGN IMMUNITY

Generally, a municipality in Texas is immune from tort liability under the doctrine of sovereign immunity. See *City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex. 1998) (en banc). However, the Texas Torts Claims Act (“TTCA”) waives immunity in certain circumstances. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (Vernon 1997). Before determining if the TTCA waives a municipality's immunity, we must decide whether: (1) the complained of actions are proprietary or governmental, (2) the actions were discretionary, and (3) the plaintiff's claims are of the type that subject the City to liability. See *City of Fort Worth v. Gay*, 977 S.W.2d 814, 816 (Tex. App.—Fort Worth 1998, no pet.).

Characterization of Actions as Proprietary or Governmental Functions

First, we consider whether the actions about which Montes complains are proprietary or governmental. Proprietary functions are those that a municipality, in its discretion, may

perform in the interests of the inhabitants of the municipality. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(b) (Vernon Supp. 2000). The TTCA does not apply to the liability of a municipality for damages arising from its proprietary functions. *See id.* Governmental functions are those enjoined on a municipality by law and are given to it “by the state as part of the state’s sovereignty, to be exercised in the interest of the general public.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a) (Vernon Supp. 2000). A municipality is liable under the TTCA for governmental functions, including warning signals, regulation of traffic, and the maintenance relating to traffic signals, signs, and hazards. *See id.* Therefore, the function at issue in this case is governmental in nature.¹

Nature of Actions as Discretionary or Non-Discretionary

Next, we must address whether this governmental function is discretionary. Discretionary acts are those that the governmental unit is not required to perform by law; the TTCA does not apply to discretionary acts. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1997). The placement of warning signals is generally a discretionary act because placement is in the discretion of the traffic engineers. *See State v. Rodriguez*, 985 S.W.2d 83, 86 (Tex. 1999) (per curiam). Montes did not assert that the placement of a barricade is a mandatory duty. Therefore, with no allegations to the contrary, we must find that the placement of warning signs is a discretionary act.

Even though the placement of warning signs is a discretionary act, and so the TTCA would not normally apply, the TTCA can still apply when the complaint is about “the absence, condition, or malfunction of a traffic or road sign, signal, or warning device” and the municipality has notice of and a reasonable time to correct the problem. TEX. CIV. PRAC. &

¹ Montes claims this analysis has no applicability to claims under section 101.060 of the Texas Civil Practice and Remedies Code, a subsection of the TTCA. Logic dictates that before we can find that a municipality exposed itself to liability under the TTCA, we must find that the TTCA applies. Because the TTCA does not apply to proprietary functions, we must find the function was governmental before we can apply the TTCA.

REM. CODE ANN. § 101.060(a)(2) (Vernon 1997). Here, there were no barricades at the dead end on West 6th Street. Montes pled that before his accident, the City had notice of the absence of a barricade.² At first glance, Montes appears to be asserting that the accident was caused by the absence of a traffic or road sign, signal, or warning device. However, Montes' petition also plainly alleges the existence of a poorly lit traffic sign warning of a dead end. Therefore, assuming, as we must, that Montes' pleadings are true, the notice exception pertaining to the absence of a traffic or road sign, signal, or warning device does not apply.

Next, we consider whether Montes' pleadings were attempting to allege that the City put up the wrong type of warning device; i.e., a sign instead of a barricade. The law on this issue is clear; the decision of what type of warning device to use is discretionary, and therefore, the TTCA does not apply. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1997); *State v. Miguel*, 2 S.W.3d 249, 251 (Tex. 1999) (per curiam) (citing *Maxwell v. Texas Dep't of Transp.*, 880 S.W.2d 461, 464 (Tex. App.—Austin 1994, writ denied)). In *Miguel*, the plaintiff sued the Texas Department of Transportation because a work crew used barrels and signs to warn of a missing guardrail. 2 S.W.3d at 251. The *Miguel* court concluded that the decision to warn of the hazard rather than repair it, as well as the decision to use a particular warning device, were discretionary acts. *Id.* As a result, the court reversed the judgment and ordered that the respondents take nothing. *See id.* In this case, it is undisputed that there was a warning sign on the street. Montes argues the City should have used a barricade. However, the decision of what type of warning device to use is discretionary, and so, the TTCA does not apply. Because the TTCA does not apply, we do not reach the final question in determining if the TTCA waives immunity, i.e., whether Montes' claim is of the type that subjects the City to liability.

² Additionally, in his response to the plea to the jurisdiction, Montes pled that Susanto's accident gave the City prior notice. However, the police report shows Susanto's accident occurred at 1000 West 6th Street instead of at 600 West 6th Street. The City now points to the police report to claim it had no notice of any defect. Because Montes claims the City had notice that the intersection needed a barricade or warning lights, we assume, for purposes of the jurisdiction analysis, such notice existed.

CONCLUSION

As the claimant, Montes had the burden of alleging facts showing that the trial court has subject matter jurisdiction. Because his pleading fails to make the requisite allegations, we cannot find the TTCA applies. Thus, we can only conclude the City did not waive its sovereign immunity, and the trial court did not err in finding it had no jurisdiction.³ Accordingly, we affirm the trial court's dismissal of the case.

/s/ Kem Thompson Frost
 Justice

Judgment rendered and Opinion filed August 31, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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³ We recognize that in the suit filed by the estates of the other three occupants of the car, the First Court of Appeals has found the City is subject to liability under the TTCA. *See Reyes*, 4 S.W.3d at 462. The trial court in that case also granted a plea to the jurisdiction, but the pleadings in that case apparently did not mention a warning sign on West 6th Street because the First Court of Appeals held that the City had notice of the absence of a warning device. *See id.* Because Montes' pleadings in the case now before us mention the warning sign and we take these pleadings as true, jurisdiction is defeated by his pleading.

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DISSENTING OPINION

I respectfully dissent.

I disagree with the majority's analysis of the "poorly lit" dead end sign with the conclusion it provides immunity to the City. Appellant does not argue that this sign, which did not warn of the dangerous excavation and pile of dirt beyond the end of the street, was the wrong type of warning device, i.e. a barricade and/or warning lights should have been used instead of a dead end sign.

Appellant claims that TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997) § 101.060 (a)(2) operates to waive the City's sovereign immunity because where the City had notice of the absence of a barricade and/or warning lights at a dangerous site, and failed to correct it within a reasonable time, immunity for discretionary acts of a governmental entity does not apply. *Reyes v. City of Houston*, 4 S.W.3d 459, 462 (Tex. App.—Houston [1st Dist.] 1999, pet. filed). *Harris County v. Demny*, 886 S.W.2d 330 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Zambory v. City of Dallas*, 838 S.W.2d 580, 583 (Tex. App.—Dallas 1992), writ denied). In *Reyes*, a companion case, it was held the City waived immunity for failing to correct the same dangerous condition made the basis of this case. The majority tries to distinguish *Reyes* by stating there was no mention of the dead end sign in the opinion. There was no reason for the Court of Appeals to mention the dead end sign because it was not relevant to the decision. It is not relevant here either.

I would hold that the City did waive its sovereign immunity and reverse the trial court's dismissal of the case.

/s/ Maurice Amidei
Justice

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Panel consists of Justices Amidei, Anderson and Frost.

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